



## Interpretive Notice & Formal Opinion (“INFO”) #5A:

### What’s “Retaliation” or “Interference”: What Activity Is Protected? What Acts Are Illegal?

#### Overview

- Not all employer actions an employee believes **unfair** are the sort of **retaliation or interference that’s illegal**. Under the “employment at will” rule, employer decisions can be for any reason, whether fair or unfair — unless an employer agreed, for example, to fire only for good cause, or after progressive discipline, etc.
- But various laws prohibit employer actions with **certain motives**, or that **interfere with rights**. Examples:
  - a firing for **taking paid leave** they had a right to is **illegal retaliation** for exercising rights; and
  - a firing to **prevent taking paid leave** is **illegal interference** with exercising rights; but
  - a firing for **not being a football fan** may be unfair, but **isn’t illegal**.
- To explain what does and doesn’t count as illegal retaliation or interference, this INFO explains:
  - what **employee actions** are protected from retaliation or interference — called “**protected activity**”; and
  - what **employer actions** are impactful (“**adverse**”) enough to be illegal if retaliatory.
- This INFO is limited to retaliation or interference as to rights under laws this Division covers:
  - for exercising rights to **paid leave for health or safety needs** under the [Healthy Families and Workplaces Act \(“HFWA”\)](#), C.R.S. Title 8, Article 13.3, Part 4);
  - for exercising rights to **whistleblowing or other expression on health or safety**, under the [Protected Health/Safety Expression and Whistleblowing Law \(“PHEW”\)](#), C.R.S. Title 8, Article 14.4); and
  - for **rights as to wages or hours**, under the [Colorado Wage Act \(“CWA”\)](#), C.R.S. § 8-4-120.
- This INFO does not cover certain retaliation or interference protections:
  - under laws that are covered in other INFOS specific to those laws, such as exercising rights as to:
    - **agricultural labor** — covered in the [INFO #12 series](#), or
    - **union-related** or other **concerted activity** among employees — covered in the [INFO #15 series](#); or
  - under laws this Division doesn’t cover — including federal laws and state laws covered by other state agencies, such as the Colorado Anti-Discrimination Act, covered by the [Colorado Civil Rights Division](#).

#### (I) What Employee Actions Are Protected Against Retaliation or Interference?

##### (A) As to health or safety under the Protected Health/Safety Expression and Whistleblowing Law (“[PHEW](#)”).

##### (1) Types of protected activity. PHEW protects workers<sup>1</sup> against retaliation or interference for:

- **Opposition** — “opposing any practice the worker reasonably believes is unlawful” under PHEW.
- **Participation** — “a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing” as to something “the worker reasonably believes... unlawful” under PHEW.
- **Concerns** — raising a “reasonable concern about workplace violations of government health or safety rules, or about an otherwise significant workplace threat to health or safety.”<sup>2</sup>

<sup>1</sup> Employees as well as independent contractors of a business with five or more contractors. [C.R.S. § 8-14.4-101\(5\)\(b\)](#).

<sup>2</sup> PHEW at first covered only public health emergencies, but now covers *any health or safety* violations or significant threats.

**(2) Limits on health/safety protected activity rights.**

- **Non-retaliation only:** The principal **isn't required to agree** with a worker's concern, or **take action** the worker requests, it just **can't retaliate with adverse action against the worker** for raising the concern or request — for example, disciplining, firing, or cutting pay or hours.
- **Illegal health disclosures:** Workers **aren't protected** if their activity shared individual health information in a way that is illegal under state or federal law.<sup>3</sup>
- **Narrower protection of "concerns":** Compared to opposition or participation, "concerns" are less automatically protected — only if: (1) made to certain persons (a principal or their agent, other workers, a government agency, or the public); (2) specific as to the violation or threat; and (3) related to a principal with control over the "conditions giving rise to the threat or violation."<sup>4</sup>

**(3) Personal protective equipment use:** Workers can't be retaliated against for voluntarily wearing their own "personal protective equipment, such as a mask, faceguard, or gloves," at work — if that PPE:

- "provides a higher level of protection" than the principal's, including that it (a) doesn't give *others* less protection (e.g., masks with vents), and (b) is cleaned or replaced, if the principal's PPE is;
- is "recommended by a federal, state, or local public health agency with jurisdiction"; and
- "does not render the worker incapable of performing" their job or duties.<sup>5</sup>

**Example 1:** If a principal provides *no* face covering when one is needed due to an airborne pathogen, then a worker's use of *any* face covering is protected, unless the principal proves it is worse than none at all.

**Example 2:** If a principal provides PPE from a known, reliable provider that satisfies all applicable health agency recommendations, then a worker's PPE of the same type must be from a reliable provider.<sup>6</sup>

**(B) As to paid sick leave** under the Healthy Families and Workplaces Act ("**HFWA**"), **protected activity** is:

- **requesting** or taking paid leave under HFWA, or **attempting** to exercise other HFWA rights;
- **informing** another person about, or **supporting** their exercise of, their HFWA rights; or
- filing a HFWA **complaint**, or **cooperating** in any investigation or other proceeding about HFWA rights.

**Example 3:** An employee requested sick leave, but it turns out they didn't have enough leave accrued. The employer agreed to allow remote work, to avoid the need for leave — but then the employer fired the employee for requesting leave they weren't entitled to. The firing was illegal, because a law requiring leave for health reasons "protects the right of an employee to inquire about and request leave even if it turns out that she is not entitled to such leave"; otherwise, employees who believe they need leave "would be discouraged from taking authorized initial steps — including preparing or formulating a request."<sup>7</sup>

<sup>3</sup> [C.R.S. § 8-14.4-102\(5\)-\(6\)](#).

<sup>4</sup> [C.R.S. § 8-14.4-102\(1\)](#); [Colorado WARNING Rules](#), 7 CCR 1103-11, Rule 5.1.2.

<sup>5</sup> [C.R.S. § 8-14.4-102\(3\)](#); [Colorado WARNING Rules](#), 7 CCR 1103-11, Rule 5.2.

<sup>6</sup> [Colorado WARNING Rules](#), 7 CCR 1103-11, Rule 5.2.3 (covering both examples as "Special Cases" of the PPE rules).

<sup>7</sup> [Milman v. Fieger & Fieger, P.C.](#), 58 F.4th 860 (6th Cir. 2023) (termination of employee for requesting leave for sick child violated FMLA even though evidence confirmed the child's condition did not qualify for FMLA leave).

**(C) As to wage and hour rights under the Colorado Wage Act ("[CWA](#)"), **protected activity** includes:**

- **complaints** — whether **formal or informal**, and whether **written or verbal** — or just offering **evidence** (whether testimony, documents, or other),<sup>8</sup>
- to **any person or entity** — such as a court, government labor agency, or employer or principal,
- as to protections under **any statute or rule related to wages or hours**.<sup>9</sup>

**Example 4:** An employee doesn't believe their employer violates any laws but, at a city council hearing, speaks to support a higher local minimum wage. Their employer fires them for doing so. The employer has unlawfully retaliated: the employee offered testimony arguing that minimum wage protections under state law are inadequate, and that a stronger law related to wages and hours is needed at the local level.

**(II) What If the Employee or Employer Is Wrong about What They Believe the Other Did?****(A) When an Employee Is Incorrect about Violations or Rights they Claim**

- A worker is **protected regardless of whether they were correct or incorrect** about rights they claim, or violations they allege — as long as they were **reasonable in believing** what they said.<sup>10</sup>
- Under this standard, statements are not protected if they were:
  - **knowingly false** (which includes being made with reckless disregard for their truth or falsity);<sup>11</sup> or
  - were made to **intentionally obtain** a benefit the employee was **not entitled to**.<sup>12</sup>

**Example 5:** An employee verbally tells human resources they weren't paid overtime for what they believed to be a 43-hour workweek: 35 hours worked and 8 hours of paid holiday time. The employee is wrong: the hours counted overtime don't include paid holiday hours. But firing the employee for claiming overtime would be retaliatory: it was a wage complaint to an employer that wasn't unreasonable or in bad faith.

**Example 6:** An employee is approved for paid leave for a blood test and physical exam. After learning the employee went bowling and never really had that appointment, the employer (1) withdraws its approval and (2) fires the employee for dishonesty. The employee files a complaint for (1) denial of paid leave and (2) retaliation for using HFWA rights. The employer acted lawfully: (1) leave wasn't for a HFWA purpose, and (2) the firing wasn't retaliatory, because the employee's paid leave claim wasn't reasonable or in good faith.

**(B) When an Employer Retaliates for Protected Activity That Hasn't Actually Occurred**

- Retaliation is unlawful because it's an **unlawful motive** for action, and because it **deters** protected activity — so it's unlawful to retaliate against not only those with **actual** protected activity, but also
  - against those an employer **incorrectly believes** engaged in protected activity, as well as
  - against those an employer **believes may** engage (or may have engaged) in protected activity.<sup>13</sup>

<sup>8</sup> [Kasten v. Saint-Gobain Perf. Plastics Corp.](#), 536 U.S. 1 (2011) (verbal complaint to supervisor and human resources that timeclock excluded certain time worked was protected activity of having "filed" a complaint); [Cotopaxi Store, Inc.](#), DLSS Claim #3959-22 (Citation July 14, 2023) (verbal complaint as to wage rights and paid sick rights was protected activity).

<sup>9</sup> [C.R.S. § 8-4-120\(1\)](#); [Colorado WARNING Rules](#), 7 CCR 1103-11, Rule 2.18. Examples of "any law or rule related to wages or hours" include federal, state, or local provisions on equal pay, prevailing wages or local minimum wages, or child labor laws on wages or hours. *E.g.*, [Christian Walters et al.](#), DLSS Claim #0240-23 (Citation Dec. 6, 2023) (employee's text messages to employer complaining of bounced paychecks qualified as protected activity).

<sup>10</sup> [C.R.S. § 8-13.3-407\(3\)](#) (protected even if incorrect, as long as reasonable and in good faith).

<sup>11</sup> [C.R.S. § 8-14.4-102\(5\)-\(6\)](#).

<sup>12</sup> [C.R.S. § 8-13.3-408](#) (dishonesty, or intentional misuse of paid leave).

<sup>13</sup> *E.g.*, [C.R.S. § 8-4-120\(1\)\(b\)](#) (protecting employee who "testified or provided other evidence, or may testify or provide other evidence") (emphasis added); [Heffernan v. City of Paterson](#), 578 U.S. 266, 272 (2016) (unlawful retaliation includes terminating an employee based on an incorrect belief that they engaged in protected activity).

**Example 7:** An employer fires an employee because they heard third-hand that the employee may be considering sending the employer a demand for a bonus the employee believes they should have been paid. The employer unlawfully retaliated: employees are protected from adverse action based on an employer's belief that they may make a complaint or evidence submission related to wages or hours.

### (III) What Are "Adverse Actions" Protected Against Retaliation?

(A) Not just termination, but anything that **might deter a reasonable worker** from engaging in protected activity, is an **unlawful "adverse action"** if it retaliates or interferes against protected activity.<sup>14</sup> Examples:

- an actual or constructive **discharge**,<sup>15</sup> **demotion**, or other **decreases** in compensation or duties;
- **suspension, discipline**, or meaningfully adverse **reprimands**;<sup>16</sup>
- a **hostile work environment**;<sup>17</sup> or
- a **transfer or duties change** an employee reasonably views as less desirable, even if not a demotion.<sup>18</sup>

(B) Because the question is whether an action is adverse enough that it might deter protected activity, **non-work-related actions** against an employee can qualify as "adverse actions."<sup>19</sup> Examples:

- filing or threatening **litigation** alleging nothing more than that a claimant lacks merit in claiming a right or a violation, or other frivolous litigation;<sup>20</sup> or
- filing or threatening **reports to law enforcement** to have a claimant arrested or deported.<sup>21</sup>

**For More Information:** Visit the Division [website](#), call 303-318-8441, or email [cdle\\_labor\\_standards@state.co.us](mailto:cdle_labor_standards@state.co.us).

<sup>14</sup> *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53, 68 (2006) (defining retaliatory "adverse action" as action that "well might have dissuaded a reasonable worker from" protected activity).

<sup>15</sup> *E.g.*, *Kids Corner*, DLSS Claim #3785-22 (Citation Dec. 29, 2023) (ceasing the assigning of any work to an employee qualifies as a termination, regardless of whether the employer expressly stated that the employee was terminated); *Martin v. Canon Business Solutions, Inc.*, No. 11-CV-02565-WJM-KMT, 2013 WL 4838913 (D. Colo. Sep. 9, 2013) (recognizing claim that plaintiff's "hostile work environment, and her constructive discharge were retaliation for taking FMLA leave").

<sup>16</sup> *Connelly v. County of Rockland*, 61 F.4th 322, 326 (2d Cir. 2023) ("cases have often mentioned 'reprimands' when listing examples of adverse employment actions," but not if a reprimand is more like mere "criticism" than an action meaningfully adverse enough to deter protected activity); *Flanigan v. Anglogold Ashanti N. Am.*, No. 1:22-CV-00646-RM-STV, 2022 WL 18109247 (D. Colo. Dec. 16, 2022) (aggressive warning that employee would be "further disciplined" if they complained of discrimination again qualified as adverse action because it was "intended to dissuade" from pursuing a complaint).

<sup>17</sup> *Martin v. Canon Business Solutions, Inc.*, No. 11-CV-02565-WJM-KMT, 2013 WL 4838913 (D. Colo. Sep. 9, 2013) (allowing claim that plaintiff's "hostile work environment, and her constructive discharge were retaliation for taking FMLA leave").

<sup>18</sup> *E.g.*, *Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022) (en banc) (denial of lateral transfer can qualify as actionable "adverse action"); *Patrolmen's Benevolent Ass'n v. City of New York*, 310 F.3d 43 (2d Cir. 2002) (reassignment of officer to different duties, outside the area in which he had been working and preferred to continue to work (domestic violence cases) and with worse community relations, qualified as "adverse action").

<sup>19</sup> *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53, 63 (2006) ("An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace.").

<sup>20</sup> *E.g.*, *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001) (employer committed "adverse action" by, in response to employee protected activity, threatening "to address your behavior through legal channels," on the premise that her disability accommodation claim was "weak at best" and her discrimination allegations were "slanderous" — because the lawsuit threat "served to 'intimidate' or 'threaten' her in the assertion of her right to make complaints or file charges"); *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775, 778 (W.D. Va. 1980) (employer committed "adverse action" by filing a defamation lawsuit in response to a former employee's administrative charge of discrimination).

<sup>21</sup> *E.g.*, *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) ("the filing of [criminal] charges against a former employee may constitute adverse action"); *Beckham v. Grand Affair of N.C., Inc.*, 671 F. Supp. 415, 419 (W.D.N.C. 1987) (having a former employee arrested for trespass for returning to the premises after her termination); *Wage Protection Rule* 7 CCR 1103-7, Rule 4.8 2 ("Any effort to use a person's immigration status to negatively impact" labor rights or proceedings is an unlawful act of obstruction [and] retaliation," including "to 'threaten[] to report to law enforcement officials the immigration status of the threatened person or another person'" to induce a person to give up a labor right of claim).